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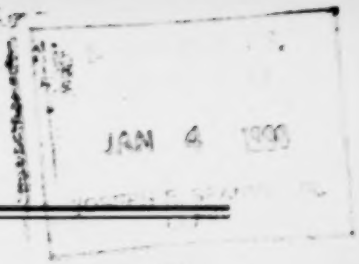

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

– against –

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether an award of compensatory education imposed against a state because of a past violation of a federal right is barred by the eleventh amendment.

2. Whether a federal court order vacating a state Commissioner's order and reinstating an impartial hearing officer's ruling that the state provide compensatory special education to an adult to redress past procedural violations of the Education of the Handicapped Act is barred by the eleventh amendment.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by citizens or subjects of any foreign state.

20 U.S.C. § 1412(2)(B) provides:

> (B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the state not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the state not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any state if the application of such requirements would be inconsistent with state law or practice, or the order of any court, respecting public education within such age groups in the state;

20 U.S.C. § 1415(b)(1)(E), entitled Procedural Safeguards provides:

> an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

No. 89-

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Thomas Sobol, Commissioner of the New York State Education Department, petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on October 27, 1989. That judgment was rendered after this Court granted certiorari, vacated the Second Circuit's prior judgment, and remanded for reconsideration in light of *Dellmuth v. Muth*, 491 U.S. ____, 109 S. Ct. 2397 (1989). The Court's opinion in *Sobol v. Burr* is reported at 491 U.S. ____, 109 S. Ct. 3209 (1989) and is reprinted in the appendix to this petition at 7a.

Opinions Below

The opinion of the Court of Appeals reinstating its prior opinion is reported at 888 F.2d 258 (2d Cir. 1989). It is reprinted in the appendix to this petition at 1a to 4a. The Court's prior opinion is reported at 863 F.2d 1071 (2d Cir. 1988). It is reprinted in the separately bound supplementary appendix to this petition at 1a to 17a.

The opinion of the United States District Court for the Southern District of New York is unreported and is reprinted in the supplementary appendix to this petition at 26a to 33a. An opinion of the district court addressing respondent's claim for administrative attorneys' fees is reported at 683 F. Supp. 46 (S.D.N.Y. 1988) and is reprinted in the supplementary appendix to this petition at 18a to 25a.

The decisions rendered by the impartial hearing officer and Commissioner Ambach are unreported and are reprinted in the supplementary appendix to this petition at 43a to 121a and 34a to 42a, respectively.

Jurisdiction

The judgment of the Court of Appeals on remand was entered on October 27, 1989. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1)(1964 & Supp. 1989).

Statement of the Case

Respondent Clifford Burr, by his parents, commenced this action pursuant to 20 U.S.C. § 1415(e)(4) to challenge a limited aspect of the decision made by the Commissioner of the New York State Education Department ("SED"), upon his review of a decision rendered by an impartial hearing officer under the Education of the Handicapped Act, 20 U.S.C. § 1400 et seq. ("EHA" or "The Act"). Respondent's parents contested the Commissioner's decision to the extent that it reversed the hearing officer's determination that Clifford be provided an additional year of education at the Institute, at state expense, after he

reached the age of twenty-one, because of delay in an administrative hearing involving Clifford's placement at the New York Institute for the Education of The Blind ("Institute"). S. App. at 41a-42a.[1] The essential dispute between the Burrs and the Institute at the impartial due process hearing was whether the Institute was an appropriate placement for Clifford. The Burrs did not challenge the major portion of the Commissioner's decision on appeal, which affirmed the decision of the hearing officer that the Institute was an appropriate placement.

Clifford Burr is a multiply handicapped adult who is blind and suffers from cerebral palsy and profound mental retardation. S. App. at 34a.[2] He was twenty-one years old on December 30, 1988. S. App. at 45a. As of December 1984, when he was almost seventeen, he functioned at the academic level of a 20-month old child. S. App. at 35a. In light of his multiple handicaps and profound mental retardation, the primary goal of Clifford's individualized education programs ("IEPs"), see 20 U.S.C. § 1401(19), is habilitation, or training in life skills, such as feeding and dressing himself. S. App. at 117a-118a.

Under the EHA, the local educational agency is responsible for providing special education, designing the IEP and making placement recommendations for handicapped children who reside in the school district. 20 U.S.C. §§ 1401(19), 1414(a)(5); 34 C.F.R. § 300.341, App. C.; N.Y. Educ. Law § 4402. The EHA requires that "a free appropriate public education be available" to handicapped children who are between the ages of three and twenty-one, unless there is a state law to the contrary. 20 U.S.C. § 1412(2)(B). New York state law provides education until the end of the school year in which the student attains the age of

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[1] The Institute is a privately owned school offering services to the blind. It receives tuition support from the state for a percentage of its pupils. N.Y. Educ. Law § 4207(4).

[2] Citations to "A.____" are references to the Appendix in the Second Circuit. Citations to "App. at ____" are references to the appendix to this petition. Citations to "S. App. at ____" are references to the separately bound supplementary appendix to the petition.

twenty-one. N.Y. Educ. Law §§ 3202, 4401(1), 4402. The part of the local educational agency responsible for Clifford's IEP and his educational placement was the Committee on the Handicapped ("COH") of the New York City Board of Education, Brooklyn School District, District 21, where Clifford resides. A. 255-257. Clifford's first educational placement was at a preschool program in Brooklyn. He then attended the Jewish Guild for the Blind, and then the Association for the Advancement of the Blind and Retarded ("AABR"). S. App. at 45a. Both were private schools offering services to the handicapped and each placement was arranged for Clifford by the COH of District 21 of the New York City Board of Education. *Id.*

A. *Proceedings Before The Impartial Hearing Officer*

In the Spring of 1984, the AABR informed the Burrs and the COH that Clifford's AABR program would close in June of that year. S. App. at 35a. The COH developed a new IEP and recommended that Clifford be placed at a Special Education Program at Public School 396 in Brooklyn. Although Clifford's parents agreed that the goals and services provided for Clifford in the new IEP were appropriate, they rejected the placement at P.S. 396. S. App. at 45a-46a. The COH attempted to locate other placements and in the interim provided Clifford with home instruction pursuant to Clifford's IEP at no cost to the Burrs. S. App. at 36a.

The COH contacted several private schools in an effort to locate an alternative placement for Clifford, but the private schools rejected him. S. App. at 36a. Pursuant to N.Y. Educ. Law § 4206(3) and 8 N.Y.C.R.R. § 200.7(d), the Burrs asked the SED to appoint Clifford to a state supported school for the blind. Their application was referred to the Institute. 8 N.Y.C.R.R. § 200.7(d). The Institute, after evaluating Clifford, informed the Burrs that it would not recommend Clifford for appointment to the Institute. S. App. at 36a.

On December 21, 1984, the Burrs requested an impartial hearing pursuant to 20 U.S.C. § 1415(b)(1)(E) and 8 N.Y.C.R.R.

§ 200.7(d)(1) to challenge the Institute's rejection of Clifford. Pursuant to the state regulation in effect at the time, 8 N.Y.C.R.R. § 200.7(d)(1), the SED designated a hearing officer in timely fashion to conduct the hearing involving the Burrs and the Institute.[3] A. 233. The parties requested several adjournments, S. App. at 51a-52a, 62a-63a, n.8, A. 235, 236, and, pursuant to a federal regulation permitting a hearing officer to grant such adjournments, the requests were granted. 34 C.F.R. § 300.512(c). The hearing, which was vigorously litigated by the Burrs and the Institute, was not completed within the 45-day period provided by the federal and state regulations.[4] 34 C.F.R. § 300.512; 8 N.Y.C.R.R. § 200.5(c)(10).

On January 27, 1986, the hearing officer decided that Clifford should be placed at the Institute and that because of the delay in the completion of the hearing his education at the Institute "shall continue until the end of the school year in which Clifford shall attain the age of 22 years". S. App. at 120a-121a.

B. *Appeal To The Commissioner*

The Institute, as a party aggrieved by the hearing officer's decision, appealed to the Commissioner pursuant to 20 U.S.C. § 1415 and 8 N.Y.C.R.R. § 200.7(d)(1). The filing of briefs on the appeal to the Commissioner was completed on March

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[3] In 1987, the New York State Education Department amended its regulations regarding applications to state-supported schools. 8 N.Y.C.R.R. § 200.7(d)(1)(ii)(1987). Under the current version, if a parent disagrees with the recommendation made by a local school board's committee on special education (the successor to the COH) as to such an application, the parents may ask the local board to appoint a hearing officer to review the recommendation. *Id.*

[4] Respondent was represented at the Institute hearing first by one advocate and then by three different attorneys and six student interns from the Federal Litigation Clinic of New York Law School. S. App. at 50a, n.4. Respondent cross-examined one Institute witness for six days of the 16-day hearing, S. App. at 64a, n.11, and the parties generated a transcript of approximately 2000 pages and another 2000 pages of exhibits. S. App. at 52a.

31, 1986 and the Commissioner rendered his decision on May 20, 1986. Thus, the Commissioner rendered his opinion on a 4,000 page record only 20 days after the 30-day time period specified in the federal regulation. 34 C.F.R. 300.512(b). The Commissioner sustained the hearing officer's order that Clifford attend the Institute but reversed the hearing officer's order requiring that Clifford receive an additional year of education at the Institute at state expense beyond the age of twenty-one. S. App. at 42a. The Commissioner referred to his earlier decision in which he had held such relief to be unauthorized by any statutory or regulatory provision. *Matter of a Handicapped Child*, 19 Ed. Dept. Rep. 148 (1979). S. App. at 41a. Noting a split in the federal courts of appeal on whether compensatory education is available under the EHA, the Commissioner held that under the circumstances of this case such relief would, in any event, be unwarranted. *Id.* Pursuant to the Commissioner's decision, and in accordance with New York and federal law, Clifford attended the Institute from June of 1986 until June of 1989, the end of the school year in which he attained the age of twenty-one. S. App. at 37a-38a. N.Y. Educ. Law §§ 3202, 4401, 4402(5); 20 U.S.C. 1412(2)(B). He is presently attending the Institute pursuant to the vacated and then reinstated judgment of the Second Circuit. He was twenty-two years old on December 30, 1989. The "school year in which Clifford shall attain the age of twenty-two years", S. App. at 120a-121a, ends on June 21, 1990.

C. *Proceedings In The District Court*

Respondent's complaint in the district court challenged the Commissioner's decision insofar as it reversed the hearing officer's order that an additional year of education at the Institute be provided, at state expense, after Clifford completed the academic year in which he attained the age of twenty-one. The complaint alleged that the failure to complete the hearing in 45 days constituted the denial of a free appropriate education during the hearing process. In October 1986, the Burrs filed an amended complaint in which they alleged, for the first time, that the Commissioner had improperly failed to treat the hearing officer's decision as final. A. 150. Respondent demanded two

additional years of education at the Institute, at State expense, after he attained the age of twenty-one. A. 151-52.

The Commissioner moved to dismiss the amended complaint on the ground that an award of compensatory education after the age of twenty-one, to redress a claim of past deprivation or past procedural violations, was not authorized by the statute and was barred by the eleventh amendment. The Commissioner argued that his decision accorded with the EHA, which expressly limits the right to a free appropriate public education to children between the ages of three and twenty-one. 20 U.S.C. § 1412(2)(B); N.Y. Educ. Law §§ 3202, 4401(1). Plaintiff cross-moved for summary judgment.[5]

On November 9, 1987, the district court granted the Commissioner's motion to dismiss the amended complaint and denied respondent's cross-motion for summary judgment. S. App. at 32a. The court ruled that pursuant to the explicit and unambiguous language of 20 U.S.C. § 1412(2)(B) and N.Y. Educ. Law §§ 3202, 4401(1), there was no right under the EHA or state education law to a free appropriate public education after the age of twenty-one. Respondent had not been aggrieved by the Commissioner's decision upholding Clifford's placement at the Institute, and did not appeal from that portion of the decision, but rather sought only to reverse the Commissioner's decision denying him additional education after the age of twenty-one. The district court, relying on the statute, held that because the Act did not create a substantive right to free education past the age of twenty-one the procedural protections of the EHA

[5] In opposing the cross-motion for summary judgment, the Commissioner contested, *inter alia*, respondent's claim that Clifford was without education during the administrative process. Except for a brief period, the COH had provided Clifford with home instruction in accordance with his IEP during the administrative proceedings. S. App. at 80a; A. 160, 246, 255-57, 259. Home instruction can be an adequate form of free appropriate public education, N.Y. Educ. Law § 4401(2)(a); *Smrcka v. Ambach*, 555 F. Supp. 1227, 1233 (E.D.N.Y. 1983), and no finding has been made that the home instruction provided respondent was not appropriate.

could not and did not extend to a party claiming deprivation of such a right. 20 U.S.C. § 1415(b)(1)(E) & (2), S. App. at 30a-31a. Accordingly, there was no basis for Clifford's claim that the Commissioner's decision must be vacated as in conflict with the procedural requirements of the EHA. *Id.*

The district court held that, in addition, the court itself could not award the compensatory education sought by respondent because such relief was indistinguishable from the retroactive relief sought in *Edelman v. Jordan*, 415 U.S. 651, 666 (1974), and thus was barred by the eleventh amendment. S. App. at 31a-32a. The court distinguished *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986), on the ground that they did not involve awards against state defendants and therefore did not raise an issue under the eleventh amendment. S. App. at 32a.

Following entry of an order addressing respondent's claim for administrative attorneys' fees, the district court entered a Rule 54(b) judgment as to all of respondent's claims against the Commissioner without resolving respondent's claim for administrative level attorneys' fees against the Institute.

D. *Proceedings In The Court Of Appeals*

Respondent appealed both of the district court's orders to the United States Court of Appeals for the Second Circuit. The Second Circuit dismissed respondent's appeal of the district court's decision denying administrative level attorneys' fees for lack of an adequate statement of reasons for entering a Rule 54(b) judgment. S. App. at 6a-7a. However, it exercised jurisdiction over the appeal from the district court's order sustaining the Commissioner's decision denying Clifford additional years of education after the age of twenty-one. S. App. at 7a-8a.

The court reversed the judgment of the district court, ruling that the EHA permits an award of additional years of education after a child reaches the age of twenty-one if the child was deprived of a free appropriate public education between the

ages of three and twenty-one. S. App. at 14a, relying upon 20 U.S.C. § 1415. The court of appeals ruled that Clifford had been deprived of such an education because the impartial hearing and review had taken longer than the time specified by federal and state regulations, see 34 C.F.R. § 300.512; 8 N.Y.C.R.R. § 200.5(c) (10), and because the Commissioner's review of the decision of a hearing officer designated by the SED violated the impartiality and finality requirements of the EHA. 20 U.S.C. § 1415(b)(2), (c) and (e) (1), (e)(2).

In deciding that the Commissioner's review did not satisfy the impartiality requirement of 20 U.S.C. § 1415(b)(2), the court did not cite any specific evidence of bias or partiality. The court instead relied on the Third Circuit's decision in *Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir.), *rev'd sub nom. Dellmuth v. Muth*, 491 U.S.____, 109 S. Ct. 2397 (1989), and the Senate Conference Report upon which the Third Circuit relied. S. Conf. Rep. No. 455, 94th Cong. 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1502. The report stated that "no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing."

The court of appeals held that the finality provision of the EHA, 20 U.S.C. §§ 1415(e)(1) and (e)(2), also prevented the Commissioner from reviewing the decision of the hearing officer because the hearing officer had been designated by the SED. The Commissioner's review was performed pursuant to 8 N.Y.C.R.R. § 200.7(d)(1), a state regulation which was part of New York's State Plan approved by the United States Department of Education. 20 U.S.C. § 1413; New York State Plan for the Education of Children With Handicapping Conditions, July 1, 1983 to June 30, 1986.

The court of appeals found that the procedural violations warranted a vacatur of the Commissioner's decision and a reinstatement of the hearing officer's direction that the State

pay for Clifford's education at the Institute beyond the maximum age specified by the statute. The court acknowledged that the statutory language explicitly limited the right to a free appropriate public education to children between the ages of three and twenty-one. S. App. at 14a, citing 20 U.S.C. § 1412 (2)(B). Nevertheless, it held that "in some circumstances", such as those presented by the *Burr* hearing, the scope of the remedy could extend beyond a statutory classification explicitly defined by Congress. S. App. at 14a-15a.

Without resolving the question presented in *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3d Cir.), *rev'd sub nom. Dellmuth v. Muth*, 491 U.S. ____, 109 S. Ct. 2397 (1989), of whether, in enacting the EHA, Congress had abrogated the eleventh amendment immunity of the states, the Second Circuit held that the award of compensatory education would, in any event, not violate the eleventh amendment. It stated that it was merely vacating the Commissioner's decision and thereby reinstating the ruling of a state designated hearing officer who was himself not constrained by the eleventh amendment. Moreover, the court stated, the "mandatory injunction awarded Clifford in this case is purely prospective in nature and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment." S. App. at 17a.

The court's judgment, reversing the district court's order and remanding to that court with instructions to vacate the Commissioner's decision and reinstate the hearing officer's decision, was entered on December 12, 1988. S.App. at 17a.

E. *Proceedings In This Court*

Commissioner Sobol petitioned this Court for a writ of certiorari to review the Second Circuit's judgment. No. 88-1493 (filed on March 10, 1989). After issuing its opinion in *Dellmuth v. Muth*, 491 U.S. __, 109 S. Ct. 2397 (1989), holding that Congress had not abrogated the eleventh amendment when it enacted the Education of the Handicapped Act, the Court granted certiorari in this action, vacated the Second Circuit's judgment and remanded for reconsideration in light of *Dellmuth*. *Sobol v. Burr*, 491 U.S. __, 109 S. Ct. 2397, App. at 7a.

F. *Proceedings On Remand To The Second Circuit*

The Second Circuit vacated its judgment on August 3, 1989, pursuant to this Court's mandate. See App. at 5a to 6a. On October 27, 1989, after receiving letter briefs from the parties, it issued a brief opinion reinstating the judgment. App. at 1a to 4a. The Court of Appeals stated that *Dellmuth* did not affect its holding because its prior judgment had not been based on a ruling that Congress abrogated the eleveventh amendment. App. at 3a, S. App. at 16a. The Court of Appeals stated that its two rationales for the relief it awarded were not undermined by *Dellmuth*. 888 F.2d at 258-259, S. App. at 3a to 4a. Accordingly, the court reaffirmed its prior judgment. App. at 4a.

Reasons for Granting the Writ

The Court of Appeals' Judgment Is Contrary To The Eleventh Amendment Bar Against Compensatory Awards Payable Out Of The State Treasury For Past Violations Of A Federal Right.

A. *The Eleventh Amendment Bar Is Not Avoided By The Court Of Appeals' Characterization Of Its Judgment As Prospective In Nature*

This Court should grant certiorari to review the Second Circuit's reinstatement, on remand, of its vacated judgment. The Court of Appeals erred in characterizing the mandatory injunction requiring the provision of an additional year of compensatory education for Clifford Burr as prospective relief which is not barred by the eleventh amendment. Its holding on remand is in conflict with the decision of this Court in *Dellmuth v. Muth*, *Edelman v. Jordan* and other decisions embodying the established eleventh amendment jurisprudence of this Court. It is also inconsistent with decisions of the Eighth and Ninth Circuits. *Alexopulos v. San Francisco School Dist.*, 817 F.2d 551, 553 (9th Cir. 1987); *Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986); *Miener v. State of Missouri*, 673 F.2d 969, 982 (8th Cir.)

("*Miener I*"), *cert. denied*, 459 U.S. 909 (1982)[6]. *See also Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986)(tuition reimbursement award against state barred by the eleventh amendment).

The purpose of the compensatory education award was to provide equitable restitution to Clifford Burr to compensate him for an alleged deprivation of benefits under the EHA. This is precisely the type of retrospective injunction which *Edelman v. Jordan*, 415 U.S. 651 (1974), held was barred by the eleventh amendment. The *Edelman* injunction, requiring equitable restitution of public assistance benefits, would also have required present action by the defendants but was nonetheless held not to be a prospective injunction. *Id.* at 665. Only an injunction to remedy an ongoing violation of a federal right can properly be characterized as a prospective injunction and therefore escape the eleventh amendment prohibition. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S.89, 102-103 (1984); *Ex parte Young*, 209 U.S. 123 (1908). As the district court correctly recognized, the relief sought by respondent was a backward-looking injunction, awarding relief for a past deprivation, not an injunction to remedy an ongoing violation of a federal right. S. App. at 31a-32a.

The Court of Appeals here did not find the Commissioner to be engaged in any ongoing violation of Clifford's federal rights. S. App. at 5a-6a. The relief it ordered was intended solely to redress a past wrong and will require the expenditure of funds out of the state treasury. See N.Y. Educ. Law § 4207(4). It thus cannot be characterized as "prospective only". See *Green v.*

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[6] The later decision of the Eighth Circuit in *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) ("*Miener II*") was rendered after the dismissal of the state defendants on eleventh amendment grounds had been affirmed in *Miener I*, 673 F.2d 969 (8th Cir. 1982). Therefore, the *Miener II* court had no occasion to address the eleventh amendment in its dicta discussing compensatory education. *Miener v. State of Missouri*, 800 F.2d at 752. The *Miener II* court made no award of compensatory education but merely stated that if the plaintiff could prove a violation of the EHA on remand, she might be entitled to a compensatory education award against the local defendants. 800 F.2d at 751.

Mansour, 474 U.S. 64, 70 (1985)(declaratory, injunctive and notice relief violate the eleventh amendment where there is no ongoing violation of federal law but only an alleged past violation of federal law).

The eleventh amendment does not permit the imposition of a compensatory education award against the State for past procedural violations. Whether the award is in the form of one year's tuition reimbursement as in *Dellmuth*, or one year's tuition at state expense after the age of twenty-one is immaterial. Both are federal court judgments against the State compensating a plaintiff, in the form of money, for past procedural violations and are barred by the eleventh amendment. *See Papasan v. Allain*, 478 U.S. 265, 278 (1986) (relief to compensate for past violations of federal law is barred by the eleventh amendment even if "styled as something else").

It is the practical effect of an exercise of federal judicial power which determines whether the federal court's order violates the eleventh amendment. *Green v. Mansour*, 474 U.S. at 73; *Edelman v. Jordan*, 415 U.S. at 664-65. The *Green* Court's refusal to permit a declaratory judgment was based on the potential indirect effect of the judgment, which, by its terms, did not require the payment of money by the State. However, the declaratory judgment's effect was similar to "a full fledged award of damages or restitution" . . . "prohibited by the Eleventh Amendment." *Green v. Mansour*, 474 U.S. at 73.

In *Papasan*, the plaintiffs argued that they suffered from the continuing effects of a past breach of a trust agreement and that the consequent continuing obligation under federal law created an exception to eleventh amendment immunity. 478 U.S. at 279. The *Papasan* Court rejected that argument and held that compensation for a past action was barred by the eleventh amendment, stating "the distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort we rejected in *Edelman*." 478 U.S. at 280.

Both the prior judgment of the Court of Appeals and the Third Circuit's judgment in *Dellmuth* are barred by the eleventh amendment, since both would have required that money be paid from the State treasury for an alleged past wrong. As the Ninth Circuit has held, a parent's request for compensatory education beyond the age of 21 is "virtually identical to a request for money damages measured by the cost of the educational services provided." *Alexopulos v. San Francisco School Dist.*, 817 F.2d 551 at 553 (9th Cir. 1987) (citing *Alexopoulos v. Riles*, 784 F.2d 1408, 1412 (9th Cir. 1986)). *See also Miener v. State of Missouri*, 673 F.2d 969, 982 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982) (compensatory education and tuition reimbursement indistinguishable for eleventh amendment purposes).

The Court of Appeals, in its reinstated judgment, cited to *Edelman v. Jordan*, 415 U.S. at 668, for the proposition that the ancillary effects on the state treasury of compliance with an injunction do not violate the eleventh amendment. 863 F.2d at 1079. S. App. at 17a. However, the "ancillary effects" exception to the eleventh amendment is limited to the effects of compliance with an injunction that is intended to redress a present, and ongoing, violation of federal law. *Green v. Mansour*, 474 U.S. at 71; *Edelman v. Jordan*, 415 U.S. at 667-668. The Second Circuit did not find that the Commissioner was engaged in any present violation of the law, but based its award of an extra year of tuition at the Institute, after Clifford Burr reaches the age of 21, solely on procedural lapses and delays which occurred between 1984 and 1986, two to four years prior to its judgment. That the relief awarded is not prospective in nature for eleventh amendment purposes is demonstrated by the following language from the *Edelman* decision:

> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications

> were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of defendant state officials.

Edelman v. Jordan, 415 U.S. at 668. The judgment of the Court of Appeals in *Burr* was not an *Ex parte Young* injunction, 209 U.S. 123, 160 (1908), to remedy a present failure to comply with federal law, but an award of equitable restitution for a past breach of a legal duty. It is thus barred by the eleventh amendment since it is not "ancillary" to any permissible remedy. *Edelman v. Jordan*, 415 U.S. at 667-68.

Furthermore, the reinstated judgment cannot be justified by the argument urged by respondent below, but not addressed by the court of appeals, that *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*") provided authority for its judgment. Prior to the Court's decision in *Milliken II*, the district court had entered an injunction requiring the desegregation of the Detroit schools, which served the purpose of ending a present violation of the equal protection clause and, therefore, was within the doctrine of *Ex parte Young*, 209 U.S. 123, 167 (1903). *See Bradley v. Milliken*, 338 F. Supp. 582, 592-94 (E.D. Mich. 1971). Some six years after the original injunction in *Milliken*, the district court entered an order requiring the state to share funding of some remedial education programs in some Detroit schools. The order was designed to further the purposes of the underlying desegregation injunction, i.e., to end a system of unequal education and was ancillary to that injunction. *See Kelly v. Metropolitan Co. Bd. of Educ.*, 836 F.2d 986, 992 (6th Cir. 1987)

(citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984)).

The students who had graduated from the Detroit schools before the remedial education injunction were not offered additional post-graduate programs to compensate them for inadequate education they had received because the schools had been racially segregated. Rather, the remedial programs approved by this Court in the *Milliken II* class action were designed to help those students who were, at that time, attending the Detroit schools. In contrast, the judgment below was *not* ancillary to an injunction necessary to end a present violation of the equal protection clause. Instead, it was designed solely to compensate an individual plaintiff for past violations of law.

This Court has not extended *Milliken II* beyond the specific context presented by that action. *Kelly v. Metropolitan Co. Board of Educ.*, 836 F.2d 986, 991-92; *Clark v. Cohen*, 794 F.2d 79, 89-92 (3d Cir.) (Becker, J. concurring), *cert. denied*, 479 U.S. 962 (1986). Both prior and subsequent decisions of the Court are inconsistent with a broad construction of *Milliken II's* "continuing effects" exception to eleventh amendment immunity *See e.g., Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987); *Green v. Mansour*, 474 U.S. 64 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102-03 (1984); *Quern v. Jordan*. 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Louisiana v. Jumel*, 107 U.S. 711 (1882). Those decisions all recognize that a federal court may not compensate a party for a state's historical violation of his rights.

The fact that the judgment requires the payment of state funds for an individual who is beyond the age of twenty one and thus no longer substantively eligible under the EHA for a free appropriate public education makes it even clearer that the award is barred by the eleventh amendment. As the Second Circuit recognized, the class afforded substantive rights by the statute is defined as those children between the ages of three and twenty-one. S. App. at 14a, 20 U.S.C. § 1412(2)(B) and N.Y. Educ. Law § 4401(1). Thus, an award of an additional year of education for an individual who is past the age of twenty-one does not

enforce any ongoing right under a federal statute. *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 601 (1988); *Susan R.M. v. Northeastern Independent School District*, 818 F.2d 455 (5th Cir. 1987); *Alexopulos v. San Francisco School Dist.*, 817 F.2d 551 (9th Cir. 1987); *Wexler v. Westfield Board of Education*, 784 F.2d 176, 183 (3d Cir.), *cert. denied*, 479 U.S. 825 (1986); *Alexopulos v. Riles*, 784 F.2d 1408, 1413 (9th Cir. 1986); *Gallagher v. Pontiac School Dist.*, 807 F.2d 75, 78 (6th Cir. 1986); *Rettig v. Kent City School District*, 539 F. Supp. 768, 772 (N.D. Ohio 1981); *aff'd in part and vacated in part*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984); *Adams Central School Dist. No. 090, Adams County v. Deist*, 214 Neb. 307, 334 N.W.2d 775, *cert. denied*, 464 U.S. 893 (1983).[7] In the absence of an explicit and unambiguous statutory provision for education after the age of twenty-one, an award against the State of an additional year of education is tantamount to a pure damage award, and thus is directly barred by the eleventh amendment.

B. *The Eleventh Amendment Bar Is Not Avoided By The Second Circuit's Vacatur Of The Commissioner's Order And Its Reinstatement Of A State-Designated Hearing Officer's Award Of Compensatory Education*

In its judgment, the Second Circuit held that the eleventh amendment was not implicated by its vacatur of the Commissioner's decision and its reinstatement of the decision of the hearing officer, because it was the impartial hearing officer, a state officer, who had initially ordered the compensatory education. The distinction does not avoid the eleventh amendment bar. It is solely by virtue of the Court of Appeals judgment, a federal court order, that the State is directed to finance compensatory education.

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[7] But see *Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (awarding two additional years of education after the age of twenty-one to be provided by the local school district, not the state).

When the practical effect of an order is to require the payment of money from the state treasury to remedy a past wrong, the nature of the order's wording is irrelevant for eleventh amendment purposes. *Edelman*, 415 U.S. at 664-66. *See also Papasan v. Allain*, 478 U.S. at 278. Formal distinctions and "end runs", will not serve to overcome the constitutional principle embodied in the eleventh amendment. *Papasan v. Allain*, 478 U.S. at 280; *see supra* at 12-14. The careful phrasing of the judgment does not avoid its inevitable result, which is that, pursuant to a federal court order, money will be paid from the state treasury, pursuant to N.Y. Educ. Law § 4207 (4), to compensate respondent for past procedural defects in the administrative process. The effect on the state treasury of the Second Circuit's order is considerably more direct than the potential effect of the declaratory judgment held to violate the eleventh amendment in *Green v. Mansour*, 474 U.S. at 72-73. This Court should grant certiorari and reverse the Court of Appeals' reinstatement, on remand, of its prior judgment.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the Court of Appeals.

Dated: New York, New York
January 3, 1990

Respectfully submitted,

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Attorney for Petitioner

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—August Term 1988

Submitted: October 18, 1988 Decided: October 27, 1989

Docket No. 88-7275

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Plaintiffs-Appellants,

—against—

THOMAS SOBOL, As Commissioner of the New York State Education Department,

Defendant-Appellee.

Before:

FEINBERG, NEWMAN and GARTH,*

Circuit Judges.

* Honorable Leonard I. Garth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Prior opinion of this court reinstated compensatory education beyond age twenty-one for severely handicapped youth, 863 F.2d 1071 (2d Cir. 1988). The Supreme Court vacated that judgment to allow further consideration in light of its intervening opinion in Dellmuth v. Muth, 109 S. Ct. 2397 (1989). Upon reconsideration, we reaffirm our prior decision.

ELLEN M. SAIDEMAN, New York, NY (New York Lawyers for the Public Interest, of Counsel), *for Plaintiff-Appellant*.

BRUCE LOREN, Legal Intern, Brooklyn, NY (BLS Legal Services Corp., Federal Litigation Program, Luzmina Gonzales, Legal Intern, Kathleen A. Sullivan, of Counsel), *for Plaintiff-Appellant*.

MARTHA O. SHOEMAKER, New York, NY (Assistant Attorney General of the State of New York, Robert Abrams, Attorney General of the State of New York, Stuart Kaufman, Legal Intern, on the brief, of Counsel), *for Defendant-Appellee*.

BROWN & WOOD, New York, NY (Peter Tufo, Anita Fisher Barrett, of Counsel), *for The New York Institute for the Education of the Blind, Amicus Curiae*.

PER CURIAM:

The background of this case is described in the prior opinion of this court, reported at 863 F.2d 1071 (2d Cir. 1988).[1] It is before us again because the judgment of this court was vacated by the Supreme Court, Sobol v. Burr, 109 S. Ct. 3209 (1989). In our opinion, we reinstated an award of compensatory education beyond age twenty-one to a handicapped youth because he had been denied his right to a free, appropriate education during delays in the statutorily mandated hearing process. Burr, 863 F.2d at 1078. A New York State hearing officer had originally awarded the youth such relief. Id. After our opinion was issued, the Supreme Court decided Dellmuth v. Muth, 109 S. Ct. 2397 (1989), which held that the Education of the Handicapped Act, 20 U.S.C. § 1400 et seq., did not abrogate the states' Eleventh Amendment immunity. The Court subsequently vacated our judgment in this case and remanded "for further consideration" in light of *Muth*. Burr, 109 S. Ct. at 3209. We thereafter asked for, and received, briefs from the parties on the effect of *Muth* on our decision in *Burr*.

We did not base our holding in *Burr* on the abrogation of the states' Eleventh Amendment immunity because we did not believe it was necessary to reach that question in that case. See Burr, 863 F.2d at 1079. We concluded, for two alternative reasons, that the amendment was not violated. First, our decision merely vacated a decision of the Commissioner of the New York State Education Department and reinstated the decision of a state hearing officer,

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1 The prior opinion was captioned Burr v. Ambach. Because Thomas Sobol is now Commissioner of the New York State Education Department, he has been automatically substituted for the former Commissioner, Gordon Ambach. See Fed. R. App. P. 43(c)(1).

whose award of relief is not limited by the Eleventh Amendment. Second, the relief granted the handicapped youth was prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment. Id. We have considered the effect of *Muth*, and we continue to believe that the Eleventh Amendment is not violated in this case. We therefore reaffirm our prior holding.

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Third day of August, one thousand nine hundred and eighty-nine.

Present: Hon. Wilfred Feinberg, C.J.
Hon. Jon O. Newman, C.J.
Hon. Leonard I. Garth, C.J.

Circuit Judges,

CLIFFORD BURR, By his Parents and Next Friends, KENNETH BURR, BETTY BURR, *Plaintiffs-Appellants,*	
-v-	
GORDON AMBACH, As Commissioner of the New York State Education Department, *Defendent-Appellee.*	88-7275

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certified copy of the judgment of the said court having been received and filed, vacating the judgment of this court with costs and remanding the said action to this court for further consideration in light of Dellmuth v. Muth 491 U.S.— (1989) pursuant to the opinion of the Supreme Court of the United States.

UPON CONSIDERATION THEREOF, it is ordered that the judgment of this court of December 12, 1988 and the mandate issued therein be and they hereby are vacated in accordance with the opinion of the Supreme Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro

By: EDWARD J. GUARDARO,
Deputy Clerk

Supreme Court of the United States

No. 88-1493

Thomas Sobol, Commissioner, New York State Department of Education,

Petitioner,

v.

Clifford Burr, etc.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Dellmuth v. Muth*, 491 U.S. ____ (1989).

IT IS FURTHER ORDERED that the petitioner, Thomas Sobol, Commissioner, New York State Department of Education, recover from Clifford Burr, etc., Two Hundred Dollars ($200.00) for his costs herein expended.

June 26, 1989

Clerk's costs: $200.00